

A “retailer maintaining a place of business in Illinois” as described in 86 Ill. Adm. Code 150.201(i) is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL.)

August 20, 2003

Dear Xxxxx:

This letter is in response to your letter dated April 28, 2003. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at www.revenue.state.il.us/Laws/regs/part1200/.

In your letter, you have stated and made inquiry as follows:

I am writing on behalf of the above-named company (hereinafter ‘the Company’) to request a ruling with respect to the Company's legal obligation to pay Use Tax pursuant to the Use Tax Act, 35 ILCS 105/1 et seq, with respect to property it leases in STATE to a STATE-based lessee who, during the term of the lease while it has exclusive control over the property, brings it into Illinois to use on a job site.

The Department regulations administering the Use Tax Act are found at 86 Il. Adm. Cd. 150.101, et seq. Most relevant to this discussion are Sections 150.101, 150.201, 150.305, 150.310, and 150.315. Other relevant rules are found in the Retailers' Occupation Tax regulations at 86 Il. Adm. Cd. 130.220, 130.2010, and 130.2013.

Statement of Facts

The Company is a leasing company organized and operating exclusively in STATE. Its only facility is located in STATE, its entire leasing inventory is located there, all its leasing business is transacted at that facility, and all customers are STATE-based lessees. Its chief customer is a related construction company. The Company is in the business of leasing construction equipment to general construction contractors. It transfers possession and use of all the leased construction equipment only at its STATE facility, and, at the end of any lease, the lessee is required to return the leased equipment to the same location. It charges, collects and pays over to the STATE Department of Revenue the sales tax imposed on STATE lease transactions under STATE law. The Company neither markets its leasing business nor solicits customers outside of STATE, and has no employees or representatives outside of STATE.

The Company does not control where a lessee takes the equipment during the term of the lease. If any of its leased equipment migrates temporarily into Illinois, it happens outside the dominion and control of the Company and under the exclusive dominion and control of the Company's STATE-based lessees.

Relevant Documents

A copy of a standard lease agreement is attached to this ruling request for your review. The Company is not aware of any other documents relevant to this matter.

Pending Audit or Litigation

This ruling is relevant to a current audit. The Department's audit staff has notified the Company that it wants to pursue an audit of the Company's book and records for the period from July 1, 1996 through December 31, 2002. Before acquiescing to the audit, the Company would like to have a written legal determination from the Department regarding the Department's lawful jurisdiction. While the Company desires a private letter ruling from the Department, it recognizes that a general information letter may be the only avenue for response.

No Prior Ruling

The Department has not previously ruled on the same or a similar issue for the Company, nor has the Company ever submitted the same or similar issue and then withdrawn it before a ruling was issued. The issue has only arisen in the context of the recent demand by the Department to audit the books and records of the Company.

Authorities Supporting the Company

The Company believes that the principles applied in the administrative hearing decision in Adirondack Truck Leasing (98-IT-0330) govern the facts and circumstances in this ruling request. The Order in the Adirondack case thoroughly analyzes relevant case law. In that case, lease transactions between the taxpayer and its lessees did not give the State of Illinois the jurisdiction to impose tax obligations on the taxpayer merely because the lessees brought the leased equipment into Illinois. The decision held that the State could not impose tax on the lessor under the following circumstances:

- the lessor had no business presence in Illinois other than the leased property brought into Illinois by lessees;
- the lessor's entire business operation was located in STATE;
- the lease transactions were entered in STATE, and all leased property was transferred to the lessees in STATE;
- the lessees were non-Illinois persons based in STATE;
- the lessor did not pursue customers or market its services in Illinois, and had no Illinois customers;
- the lessees brought the property into Illinois during the lease term while the property was under their exclusive control and possession.

The Administrative Law Judge determined that the presence in Illinois of leased property brought into the state under the control of lessees satisfied neither the 'minimal contact' requirement of the due process clause nor the 'substantial nexus' requirement of the commerce clause. He concluded, 'In this case, ATL [*the lessor*] has no physical presence in Illinois. Only its lessees do.' Therefore, there was no justification to impose tax on the lessor.

Section 150.201 of the Use Tax Regulations defines 'Use' as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property...' The Company believes that its 'use' of the property occurs in STATE, where it exercises its right or power over property by putting it into the inventory of equipment available for lease, leasing it to STATE customers, and receiving it back at the end of the lease term.

During the lease term, the Company has no dominion or control over the property. It does not exercise its right or power over the property incident to its ownership. Rather, its lessees are given exclusive control over the property. Therefore, the fact that a STATE lessee brings the property into Illinois during the lease term does not equate to the lessor 'using' property in Illinois, and it should not subject the Company to Illinois' taxing jurisdiction.

Authorities Supporting the Department

The auditor assigned to perform the Department's audit, in response to the Company's request for information supporting the Department's legal basis for jurisdiction, sent to the Company the following rulings: ST 92-580, ST 89-0618, and ST 90-571. The Department also relies on an Illinois Supreme Court decision in the case of Philco Corporation v. Department of Revenue, 40 Ill.2d 312 (1968). An administrative hearing decision relevant to this matter is UT 96-10. The Company believes that these authorities all are distinguishable from the facts and circumstances in the current matter.

Trade Secret Information

There is no specific trade secret information that needs to be deleted from the publicly disseminated version of your response.

Ruling Request

The Company requests a ruling that the Department does not have jurisdiction to impose Illinois Use Tax liability on the Company for property that it leases in STATE to STATE-based lessees who then, with exclusive dominion and control, bring the property temporarily into Illinois for use on an Illinois job site.

Thank you for your attention to this matter. Attached is a properly executed power of attorney. If you have any questions, or need any additional information, please contact me at your convenience.

The Private Letter Ruling you request cannot be granted because you are currently under audit by the Department. Further, in the context of a Private Letter Ruling or a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Wagner, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

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Enc.